ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Section 402(b)(1)(A)	)	
of the Telecommunications Act of 1996	)	**CC Docket No. 96-187**
	)	

MCI REPLY TO OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION

I. INTRODUCTION

MCI Telecommunications Corporation (MCI) hereby submits its reply to the oppositions to its Petition for Reconsideration of the Commission's Report and Order in the above-captioned proceeding (Order). The Order adopts rules to implement section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 (1996 Act), which adds section 204(a)(3) to the Communications Act (the Act).

II. THE COMMISSION'S INTERPRETATION OF DEEMED LAWFUL IS NOT COMPELLED BY THE STATUTORY LANGUAGE AND CONFLICTS WITH THE STRUCTURE AND INTENT OF THE 1996 ACT

Four local exchange carriers (LECs) -- BellSouth, GTE and Bell Atlantic/Nynex -- oppose MCI's request to reconsider the Commission's interpretation of "deemed lawful" in the new Section 204(a)(3). They argue that there is nothing ambiguous about that phrase and that the Commission's interpretation is supported by the overwhelming weight of the cases construing that language. They also claim that the Commission's

interpretation, which eviscerates the Section 208 complaint remedy for LEC streamlined tariff rates without any hint of such a drastic revision in Section 208 itself, is perfectly consistent with the intent and structure of the rest of the 1996 Act.[1]

None of the LECs, however, directly addresses MCI's point that the limited presumption that the Commission finds in Section 204(a)(3) is different from the permanent conclusive presumption that the Commission purports to find in the relevant cases. The variance between the Commission's articulation of what "deemed" usually means in prior cases and what it means in Section 204(a)(3) demonstrates that there is no single "plain meaning" of that term and that it must therefore be construed pursuant to the principles of statutory construction applied to ambiguous language. Since, even under the Commission's reading, Section 204(a)(3) establishes only a limited presumption, the interpretive issue dividing the parties is one of degree -- the extent of that presumption. There is nothing in the case law cited by the Commission that suggests that the particular limited presumption chosen by the Commission is compelled by the statutory language over the more limited presumption advocated by MCI and others.[2]

BellSouth defends the Commission's view that the word "deemed" can have only one meaning and argues that the contrary cases cited by AT&T and MCI all involved statutes with some "limiting condition" or other express provision that operated to constrain the term "deemed." BellSouth adds a summary of those cases in an Attachment

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[1] BellSouth Opp. at 2-6; GTE Opp. at 2-4; Bell Atlantic/Nynex Opp. at 2-6.

[2] See MCI Pet. at 4-6.

purporting to refute MCI's and AT&T's reading of them.[3] In attempting to distinguish MCI's and AT&T's cases on the basis of "limiting conditions," however, BellSouth simply proves MCI's argument that the statutory context must be examined to ascertain the meaning of "deemed," or, for that matter, any other word in a statute.

BellSouth's summary of Conoco, Inc. v. Skinner, 970 F.2d 1206 (3rd Cir. 1992), is a perfect illustration. After going on for a page of detail, BellSouth concedes that the court gave a limited interpretation to the word "deemed" in that case in order not to "render [another provision] meaningless." Thus, BellSouth concludes, "[t]he Court ... interpreted conflicting statutory provisions to give maximum effect to all provisions."[4] In other words, the Court did not stop its analysis with the "plain meaning" of the word "deemed;" rather, it was necessary to interpret that term in the context of the statutory structure and goals.

Having effectively jettisoned the "plain meaning" argument, BellSouth then falls back on the general principles of statutory construction, admitting that "a Court will ... look beyond the plain meaning of the statute if such [plain meaning] construction would lead to absurd results or thwart the purpose of the overall statutory scheme."[5] BellSouth then goes on to assert that MCI and AT&T have not shown that the Commission's interpretation leads to absurd results.

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[3] BellSouth Opp. at 3 and Attachment 1.

[4] BellSouth Opp., Attachment 1 at 2.

[5] BellSouth Opp. at 4.

For example, BellSouth concedes MCI's point that a Commission order under Section 204(a)(3) not to suspend and investigate a LEC streamlined tariff would have to be considered a final order subject to judicial review under the Commission's interpretation, but asserts that would not be disruptive. BellSouth cheerfully suggests that the Commission could handle the constant judicial review of such orders because the greater flexibility enjoyed by the Commission following the 1996 Act, including statutory forbearance, "all ... lessen the Commission's workload,"[6] which, no doubt, is news to the Commission. BellSouth then reverses direction again, forgetting that it is trying to demonstrate that the Commission's interpretation does not produce harsh results, and points out that "[e]ven if the Commission's workload increased, such an increase would not justify the Commission's failure to implement the plain language of Section 204(a)(3)."[7]

BellSouth's final point is that the new provision was obviously intended "to change the way in which [LEC] tariff filings are processed and treated under the Communications Act" and that MCI and AT&T simply do not like that change. Similarly, Bell Atlantic/Nynex argue that the Commission's interpretation reflects the new balance that Congress struck and is consistent with the deregulatory intent of the 1996 Act.[8] GTE adds that the new provision "changed the old tariffing scheme" and that the phrase

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[6] Id. at 5.

[7] Id. at 5 n.13.

[8] BellSouth Opp. at 5; Bell Atlantic/Nynex Opp. at 6.

"deemed lawful" is "significantly different than past tariff statutory references."[9] BellSouth also argues that, under the MCI and AT&T reading of Section 204(a)(3), that provision would have created no change in the law governing LEC tariffs, contrary to Congress's intent, and thus would render that provision "superfluous."[10]

It is true that the new provision was intended to "change[] the old tariffing scheme" -- how LEC tariffs "are processed and treated." In fact, that was the point of MCI's Petition for Reconsideration. MCI's interpretation gives weight to Congress's characterization, in the heading of Section 402(b)(1) of the 1996 Act, of the new tariff review process in Section 204(a)(3) as "streamlined procedures for changes in charges, classifications, regulations, or practices." Under MCI's approach, the new provision "streamlined" the way in which certain LEC tariffs "are processed and treated." Following the established meaning of the term "streamlined" in regulatory parlance, "deemed lawful" established higher burdens for suspensions and investigations, such as by presuming LEC tariffs to be lawful.

BellSouth highlights the tangible benefits that MCI's reading of Section 204(a)(3) provides to LECs when it points out that "[p]rior to the enactment of Section 204(a)(3), any tariff that took effect without suspension or investigation was presumed lawful...."[11] Under MCI's reading, LEC tariffs are presumed lawful upon filing, not just if and when they take effect. Thus, it is MCI's and AT&T's reading, not the LECs,' that "streamlines"

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[9] GTE Opp. at 3.

[10] BellSouth Opp. at 6.

[11] Id.

the way LEC tariffs are processed, rather than eviscerating the Section 208 remedy through the back door. If Congress had intended to accomplish the latter, it would have amended Section 208 directly, rather than presenting this change as a "streamlining" of tariff processing.[12] Generalized statements that MCI and AT&T simply prefer another result do not address these points.

III. THE STANDARD GOVERNING THE USE OF PROTECTIVE ORDERS SHOULD BE MODIFIED

In Appendix B of the Order, the Commission provides a standard protective order for use in the review of LEC tariff filings submitted pursuant to section 204(a)(3) of the Order. The Bureau will use the protective order where the submitting party includes with the tariff filing a showing by a preponderance of the evidence to support its case that the data should be accorded confidential treatment consistent with the provisions of the Freedom of Information Act (FOIA) or makes a sufficient showing that the information should be subject to a protective order.[13]

In its Petition for Reconsideration, MCI demonstrated that, because the Common Carrier Bureau will not have time to examine the information provided in support of confidentiality requests, the Order places no real limits on the LECs' ability to file cost support under confidential cover. The LECs do not dispute this, arguing instead that the routine use of protective orders represents an appropriate accommodation of conflicting

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[12] See MCI Pet. at 6-14.

[13] Order at ¶91.

interests.[14] However, Commission precedent clearly indicates that a LEC should be required to file cost support on the public record unless it has demonstrated that the information is competitively sensitive.[15] Because incumbent LECs cannot, in general, make this showing, there is no justification for failing to limit the use of protective orders in some fashion. Moreover, because the Commission did not modify Section 0.455(b)(11) of its rules, and because the Order specifies a standard that governs the use of protective orders, it is clear that the Commission did not intend to completely exempt incumbent LECs from the public cost support requirements. This would, however, be the outcome if the Order's standard governing the use of protective orders is not modified.

To be consistent with Commission precedent governing the confidential treatment of cost support data, the protective order provisions should be modified to prevent the LECs from filing cost support under confidential cover until a demonstrated level of competition has been achieved. While case-by-case evaluations of competitive conditions will no longer be possible for streamlined tariffs, the Commission will still able to evaluate the competitive conditions in a LEC's service area. Until a competitive test such as the Section 271(d)(3) standard is met, the LEC should be required to file cost support on the public record because there is little risk of competitive harm. Only when the competitive test has been satisfied should the LEC be permitted to require interested parties to enter into a protective agreement.

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[14] See, e.g., Ameritech Comments at 5-6.

[15] MCI Pet. at 17.

IV. STANDING PROTECTIVE ORDERS WILL REDUCE THE BURDEN FOR INTERESTED PARTIES

Only Ameritech objects to MCI's request that the Commission require the LECs to enter into standing protective agreements. Ameritech claims that persons with access to confidential information will have a clear sense of their legal obligation only if they execute a protective agreement each time confidential information is first made available to them.[16] However, the sanctions provided in the standard protective order are sufficient to ensure that interested parties will actively monitor their compliance with the terms of the agreement.[17] A standing protective agreement would make the process of reviewing LEC cost support data significantly less burdensome, while maintaining the same level of confidential treatment for LEC cost support as protective agreements executed on a case-by-case basis.

V. THE COMMISSION HAS THE AUTHORITY TO REQUIRE ADVANCE FILING OF MID-YEAR PCI CHANGES

In its Petition for Reconsideration, MCI requested that the Commission clarify that it has the authority to require advance filing of PCI calculations associated with mid-year exogenous cost changes. MCI noted that, in many cases, if PCI calculations were submitted at the same time as associated rate changes filed pursuant to Section 204(a)(3), the Commission and interested parties would not have sufficient time to review these

[16] Ameritech Comments at 7.

[17] Standard Protective Order at ¶13.

calculations.[18] Several incumbent LECs oppose MCI's request, arguing that the advance filing of PCI calculations is inconsistent with Section 204(a)(3). However, the Commission has already concluded that the advance filing of annual PCI changes is consistent with Section 204(a)(3), and the LECs have provided no basis for distinguishing annual and mid-year PCI changes.

BellSouth opposes the advance filing of PCI calculations by arguing that, while annual access filings were made on 90 days' notice, "there has never been an extended review period associated with mid-year PCI changes."[19] While it is true that certain mid-year PCI changes could be made on 14 days' notice, this was not the case for all mid-year changes. Recently, in the Payphone Order, the Commission required that tariff changes resulting from payphone deregulation be filed on 90 day's notice.[20] This interval was necessary to review complex calculations and large amounts of data. Under the LECs' interpretation of Section 204(a)(3), however, the Commission would have only 7 or 15 days to review future PCI changes of similar complexity. Even if the Commission does not adopt a standard interval for advance filing of mid-year PCI calculations, as suggested by AT&T, it should clarify that it has the authority to require advance filing. In some cases, PCI calculations will be relatively straightforward, and the Commission may determine that the 7 or 15 day tariff review period is sufficient. In other cases, when the

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[18] MCI Pet. at 20-21.

[19] BellSouth Opp. at 8-9.

[20] In the Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-128, September 20, 1996 (Payphone Order) at ¶370.

calculations are more complex, the Commission has the authority to require advance filing of PCI calculations.

Respectfully submitted,
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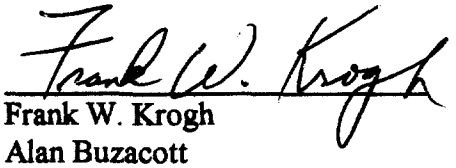
By: 

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CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that copies of the foregoing "MCI Reply to Oppositions to its Petition for Reconsideration" were sent via first class mail, postage paid, to the following on this 23rd day of April, 1997.

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